United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1232

IN THE

United States Court of Appeals

For the Second Circuit.

SPANG INDUSTRIES, INC., FORT PITT BRIDGE DIVISION, a Corporation,

Plaintiff-Appellant,

against

THE AETNA CASUALTY AND SURETY CO.,

Defendant-Appellee.

Civil No. 72-CV-22.

TORRINGTON CONSTRUCTION CO., INC.,

Plaintiff-Appellee,

against

SPANG INDUSTRIES, INC., FORT PITT BRIDGE DIVISION,

Defendant and Third-Party Plaintiff-Appellant,

against

SYRACUSE RIGGING CO., INC.,

Third-Party Defendant.

Civil No. 72-CV-463.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK AT NOS. 72-CV-22 AND 72-CV-463 CIVIL ACTIONS.

Brief for Appellees, Torrington Construction Co., Inc. and The Aetna Casualty and Surety Company.

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No. 74-1232

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Plaintiff-Appellant,

against

The Aetna Casualty and Surety Co.,

Defendant-Appellee.

Civil No. 72 CV 22

Torrington Construction Co., Inc.,

Plaintiff-Appellee,

against

Spang Industries, Inc., Fort Pitt Bridge Division,

Defendant and Third-Party Plaintiff-Appellant,

against

Syracuse Rigging Co., Inc.,

Third-Party Defendant.

Civil No. 72 CV 463

Appeal from the Judgment of the United States District Court for the Northern District of New York at Nos. 72-CV-22 and 72-CV-463 Civil Actions.

Brief for Appellees, Torrington Construction Co., Inc., and The Aetna Casualty and Surety Company.

Statement of the Issues Presented for Review.

1. Were the damages found by the Trial Court fair and reasonable and within the contemplation of the parties to the contract under all the circumstances of this case?

2. Did the Trial Court, under the principles enunciated by the New York Court of Appeals, properly deny interest on payments under the contract made by appellee, Torrington, and accepted by appellant, without protest or reservation or without violation of any statute or contract provision?

Statement of the Case.

The real appellee for the purposes of this appeal is Torrington Construction Co., Inc., (Torrington), which speaks upon this appeal additionally for the Aetna Casualty and Surety Company, an insurer having identical interests (A65)* and made a party solely because it executed, pursuant to Section 137 of the State Finance Law of New York, an instrument denominated as a payment bond, guaranteeing payment of all labor performed and material furnished to the subject public improvement contract, hereinafter referred to.

The pertinent facts of this litigation are set forth in the Findings of Fact and Conclusions of Law of Judge James S. Holden, who was assigned to try this case in the United States District Court for the Northern District of New York (A63-75).

The litigation arose out of the performance of a public improvement contract entered into between Torrington and the State of New York (State) for the reconstruction

*Wherever arabic numerals occur they refer to pages of the Appendix.

of a portion of New York State Highway Route 313 in Washington County, New York, dated September 4, 1968, designated FARC 69-104 (A33, 65).

The contract was unit price in form, containing numerous line items of work necessary to be done in order to complete the contract (A33, 66). Included was an item designated No. 29, providing for the furnishing, fabrication and erection of all structural steel for the construction of a two-span highway bridge over the Battenkill River (A12-13, 33, 37-38, 56, 66). The construction of this bridge represented about 20% of the total contract work (A68). In order to complete the construction of this bridge it was necessary to construct footings, piers and abutments of reinforced concrete, then place the two spans (12 girders) of structural steel thereon, to be followed by a concrete deck, which was to be placed in forms and poured in place, after which railing, curbing and the approaches were to be constructed (A37-38, 33, 66-62).

Pursuant to a bid submitted by Fort Pitt prior to Torrington's submitting its bid to the State for the entire contract, a contract was entered into between appellant, Spang Industries, Inc., Fort Pitt Division (Fort Pitt) for the furnishing, fabrication and erection of the structural steel in question. The subcontract between Torrington and Fort Pitt was based on a written proposal of Fort Pitt (confirming an earlier verbal quotation) dated September 5, 1969, accepted by Torrington under nominal date of October 28, 1969* (A5, 12-16, 37-40, 59, 66-67, 88-91; Ex. G).

*As explained in detail, *infra*, in this brief, the subcontract documents, executed on Torrington's behalf on October 28, 1969, were not delivered to Fort Pitt until subsequent to November 12, 1969.

The contract price for this steel was 27.5¢ per pound of structural steel furnished, fabricated and erected in place. The contract also contained a provision, tied to the aforesaid unit price, whereby Torrington agreed to rent to Fort Pitt's steel erector, Syracuse Rigging Co., Inc. (Syracuse Rigging), a crane with operator and a compressor, for the lump sum of $2,200 (A12-13, 66-67; Ex. G, A88-91). The subcontract between Fort Pitt and Torrington provided that the work described in the subcontract was to be performed in accordance with the plans and specifications of the Department of Transportion of the State (A12-13, 37; Ex. G, A89).

The subcontract did not contain any provisions for the date of performance thereof, except that it specifically provided that the *delivery of the steel was to be mutually agreed upon*, the exact words reading: "Delivery to be mutually agreed upon" (A13, 67; Ex. G, A90). The date that was initially agreed on for the delivery of the steel was late June, 1970 (A67).

Prior to the acceptance of the offer of Fort Pitt, Fort Pitt on October 13, 1969, wrote a letter to Torrington, stating in part as follows:

> "Will you please advise your projected requirement for structural steel and erection. Please advise at your earliest convenience as we will want to schedule shipment in accordance with your request" (A39).

This letter was obviously written in an attempt to carry out the provisions of the subcontract providing that delivery of steel was to be mutually agreed upon.

In reply to this letter, by return letter of November 3, 1969, Torrington stated in part as follows:

> "Please be advised that our requirements for the structural steel and erection will be late June 1970. Please advise us at your earliest convenience if this date will be met" (A41, 67).

The Torrington letter was acknowledged by Fort Pitt's letter of November 12, 1969, in which appellant stated in part as follows:

> "We are tentatively scheduling this work per your requirements and would appreciate your keeping us advised as your work progresses" (A42, 67, 80).

From the foregoing exchange of correspondence it is clear that the parties mutually agreed initially upon a delivery date of the steel for late June, 1970. The Court Below so found (A67, 80).

On January 7, 1970, Fort Pitt wrote Torrington, stating in pertinent part as follows:

> "Per your letter dated November 3, 1969 you advise that structural steel and erection will be late June, 1970.
> "Please advise at your earliest convenience if this date is still valid" (A44, 67-68).

This letter was promptly acknowledged on January 13, 1970, by Torrington, indicating in substance that the date was still valid (A45). Torrington's letter stated in part:

> "If anything should occur that would change the planned date of June 1970, I will keep you informed."

On January 29, 1970, Fort Pitt again wrote Torrington, acknowledging Torrington's letter of January 13, 1970,

which it characterized as confirming the delivery and erection of the steel in June, 1970, and further stating as follows:

> "Be advised that we are in the midst of an extensive expansion program. Due to unforeseen delays caused by weather, delivery from suppliers, etc., it is our opinion that the June date cannot be met.
>
> "We will advise you as to anticipated delivery as promptly as possible and ask your indulgence in bearing with us through this transition" (A46, 67).

The following additional quotation from appellant's letter of January 29, 1970, is also a significant paragraph, evincing the knowledge on the part of Fort Pitt that slowdowns or delays in the construction work might occur due to weather. This statement was as follows:

> "Likewise will you keep us informed as to any slowdowns due to weather or other reasons, or possible work stoppages resulting from termination of labor causes" (A47).

Torrington replied to this letter on February 2, 1970, acknowledging notice of the possible delay by Fort Pitt in furnishing the steel and requesting an estimated date when the material would be ready, so that Torrington's contract work could be scheduled (A48, 68). In further correspondence over the following three months Fort Pitt failed and refused to designate any date for steel delivery, despite the repeated requests of Torrington, promising Torrington only that a delivery date would "soon" be set (A49-50). Having received no date for steel delivery by May 12, 1970, Torrington wrote a letter to Fort Pitt, complaining of the delay, neglect and failure on the part of Fort Pitt to furnish Torrington with a confirmed date of delivery of the steel, and threatening to

terminate or cancel the subcontract unless Fort Pitt acted within ten days to establish a delivery date (A49-50, 67-68). To this letter Fort Pitt finally replied on May 20, 1970, confirming a telephone conversation of May 19, 1970, stating unequivocally:

> "* * *(W)e have esablished a ship date of early August, 1970" (A51, 68).

The Trial Court has found that the bridge was ready to receive structural steel by August, 1970, and that the entire contract work was then essentially completed, except for the bridge (A68). Instead of shipping the bridge steel early in August, Fort Pitt's shipments did not commence from its Canonsburg, Pennsylvania plant, so far as the girders were concerned (which, of course, were the key of the entire bridge work) until August 24, 1970,* followed by successive shipments from Canonsburg on August 26, 27 and 31, and September 2 and 4, 1970 (A68-69). The September 4 shipment finally arrived by rail at Shushan, New York, a hamlet near the bridge site, on September 17 (A69). The final shipment of steel was made on November 4, 1970 (A69).

Because of the failure of Fort Pitt to inform its erecting subcontractor, Syracuse Rigging, of the shipment of August 21, 1970, Syracuse Rigging did not get to the contract site until September 8, 1970, whereas the steel began arriving at the Shushan railhead about September 1. Because the railroad required immediate unloading, Torrington was forced to start unloading steel without the aid of Syracuse Rigging. The railhead unloading was subsequently completed with the help of Syracuse Rig-

*Prior to August 21, 1970, Fort Pitt had shipped less than 1 ton of small steel parts (A68). On August 21, 1970, various additional small parts were shipped, totalling about 25 tons (A68-69).

ging, working with Torrington's equipment and operators (A69). It is important to keep in mind, as found by the Trial Court, that in order for Syracuse Rigging to erect the steel on either or both bridge spans, it was necessary that all the girders, which were custom fabricated, be available for the span where they were to be applied (A71). It was not until September 16 that sufficient steel had been delivered to the job site to enable Syracuse Rigging to commence its work, which was finally completed on October 8, 1970 (A71).

The foregoing paragraphs present the basic reason for the damages imposed on Torrington, *i. e.*, the failure of Fort Pitt to meet its second confirmed steel delivery date of early August, 1970, which deferred date had been reluctantly acceptable to Torrington, albeit of necessity. The delay of approximately five or six weeks (from early August to the middle of September) was a critical one weatherwise in the geographic location where the contract was being performed, namely, on the Vermont-New York State border in upper New York State. The Trial Court, in recognition of this fact, has found that it was not until October 28, 1970, that the bridge was ready to receive the concrete deck and that "by this time of year the danger of freezing weather in Washington County, New York, is imminent" (A71). The Court found that "oftentimes severe frosts occur prior to this date" (A71).

The contract specifications, as found by the Court, required that pouring of concrete be accomplished at temperatures of 40 degrees Fahrenheit and above, unless special permission of the State was obtained. To meet this requirement Torrington, the Court has found, decided "to go ahead and ready the bridge for pouring on a crash basis and to complete the pouring in a single day"

(A71). The State's supervising engineer gave special permission to Torrington to make the pour on October 28, at 32 degrees Fahrenheit. It is undenied that the pour was in accordance with recognized and accepted construction procedures. In fact, there is no controversy that Torrington did not at all times follow customary and accepted construction procedures in performance of its contract work in all stages, and there is no evidence and no finding of the Trial Court to the contrary.

The Trial Court has found that if Torrington had not proceeded as it did, it would have been required to delay the pouring of the concrete for the completion of the bridge deck until June, 1971 (A71). The "crash basis" pour was undertaken to avoid this delay, and, of course, to avoid the heavy damages which would have necessarily arisen from carrying the work over into another season with the normal increased increments of costs. Torrington was able to complete the bridge and the contract in 1970 only by performing a considerable amount of overtime work and by employing other expediting efforts, such as protecting the concrete while it was being poured, bringing additional equipment to the site and expediting associated work. Torrington necessarily expended the sum of $7,653.57, which was found to be the fair and reasonable amount of the damages sustained as a result of the delay on the part of Fort Pitt, inclusive of the delay in getting Syracuse Rigging to the job site in September, 1970 (A71-72). The Court Below found that if the steel had been shipped, as agreed by Fort Pitt, in early August, 1970, the race against cold weather and the attendant increased expenses would have been avoided.

There were other damages asserted by Torrington, which the Court rejected as not being "supported by evidence that directly connects this expense to the delay in the shipment of the girders" (A73).

The first issue before this Court is whether the damages which were awarded to Torrington because of Fort Pitt's breach of contract were fair and reasonable and within the contemplation of the parties to the contract under all the circumstances of the case. The Court Below necessarily found that they were (A71-72).

The other issue before this Court relates to interest claimed to be due on payments made by Torrington to Fort Pitt and accepted without protest. These involve in the aggregate approximately $51,000 in payments of principal made by Torrington to Fort Pitt after the date when they allegedly became due under the terms of the subcontract. The Trial Court has found that these payments were accepted by Fort Pitt without protest, and that under New York decisional law, as well as other decisional law, such acceptance legally waives any claim for interest (A79-80).

ARGUMENT.

I.

The damages awarded to Torrington were fair and reasonable, within the contemplation of the parties at the time the subcontract was entered into and were based upon uncontradicted evidence.

The damages awarded Torrington by the Trial Court were founded, basically, upon uncontradicted evidence that Torrington

a. Was forced to itself perform Fort Pitt's steel unloading duties at the Shushan, New York, railhead in early September, 1970, at a net added expense of $1,164.89, because of Fort Pitt's failure to timely inform its

erector, Syracuse Rigging, of steel shipments from its Canonsburg, Pennsylvania, plant in late August, 1970; and

b. To perform its contract work in the customary economical manner, necessarily had to expend the added sum of $6,488.68 in labor, materials and equipment rentals in order to expedite its work in an effort to overcome the 5 or 6 weeks delay in the delivery and erection of the structural steel beyond the date last promised by Fort Pitt, for a total of $7,653.57 in damages.

Fort Pitt, on this appeal, argues that the latter portion of the said damages were "special" damages which it reasonably could not contemplate at the time of contracting with Torrington and for which it had no liability under the established rules of contract law. Nothing could be further from the truth—either with respect to those damages which Fort Pitt should reasonably have contemplated for breach of contract damages or as to its liability under governing rules of contract law.

Torrington does not disagree with the general principle of law espoused in the cases set forth in Point 1 of appellant's brief (at pp. 6 through 10); namely, that a defendant is liable for all damages flowing naturally and directly from a breach of contract in the usual cause of events but is normally to be charged only with those special damages he reasonably could foresee as a probable result of his breach or of which he was informed when the contract was made.

Unfortunately for appellant, this principle does not help its case—rather, when analyzed, it devastates Fort Pitt's case.

Fort Pitt's whole argument, it is submitted, is built upon a number of erroneous assumptions and illogical

additions to the foregoing valid principle of law. Fort Pitt reaches its conclusion of non-liability for the damages suffered by Torrington as the result of appellant's breaches of contract herein only by ignoring the realities and consequences of the above legal principle and other associated principles of law as well as the facts of the case.

It must perhaps, above all, be remembered that the particular contract and the circumstances surrounding its execution and its breach must be looked to in determining what damages should be deemed to flow naturally from the breach and whether or not a breaching party should be charged with reasonably foreseeing particular special damages therefrom.

In one leading New York case on this point, *New York Water Service Corp. v. City of New York*, 4 A. D. 2d 209, 213, 163 N. Y. S. 2d 538 (1st Dept. 1957), the Court said:

> "In fixing damages the object generally is to compensate or to indemnify, that is, to put the plaintiff in as good a position as he would have been had the defendant abided by its agreement (5 Williston on Contracts [rev. ed.], §1338). This should be accomplished at the least cost to defendant who is only to be charged with those injuries that he had reason to foresee as a probable result of his breach when the contract was made. *If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendant to foresee it;* otherwise, it must be shown specifically that the defendant had reason to know the facts and to foresee the injury (Restatement, Contracts, §330). Gains prevented as well as losses sustained are proper elements of damage. *There is no rule of thumb to be applied to any given set of facts. We must look to the nature of the contract and the circumstances surrounding its breach.*" (Italics supplied.)

In a leading, early New York Court of Appeals case, *Chamberlain v. Parker*, 45 N. Y. 569 (1871), that Court held, at page 572:

> "The measure of damages is to be sought in the contract made by the parties, and where the amount of compensation is not fixed by the contract, then the natural, approximate injury occasioned by the breach of duty is, within the contemplation of the parties, the measure of compensation."

In another leading New York Court of Appeals case, *Leonard v. The New York, etc., Tel. Co.*, 41 N. Y. 544 (1870), the Court stated:

> "The measure of damages to be applied to cases as they arise, has been a fruitful subject of discussion in the courts. The difficulty is not so much in laying down general rules, as in applying them. The cardinal rule undoubtedly is, that the one party shall recover all the damages which has been occasioned by the breach of contract by the other party. But this rule is modified in its application by two others. The damages must flow directly and naturally from the breach of contract, and they must be certain, both in their nature and in respect to the cause from which they proceed. Under this latter rule, speculative, contingent and remote damages, which cannot be directly traced to the breach complained of, are excluded. Under the former rule, such damages are only allowed, as may fairly be supposed, to have entered into the contemplation of the parties when they made the contract, as might naturally be expected to follow its violation. It is not required, that the parties *must* have contemplated the actual damages, which are to be allowed. But the damages must be such, as the parties may fairly be *supposed* to have contemplated, when they made the contract. Parties entering into contracts, usually contemplate that they will be performed, and not that they will be

violated. They very rarely actually contemplate any damages, which would flow from any breach, and very frequently have not sufficient information to know what such damages would be. As both parties are usually equally bound to know and be informed of the facts pertaining to the execution or breach of a contract, which they have entered into, I think, a more precise statement of this rule is, that a party is liable for all the direct damages, which both parties to the contract would have contemplated as flowing from its breach, if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts" (41 N. Y. 566-567).

It is stated, in part, in *New York Jurisprudence, Damages,* Volume 13, Section 56, at page 502, by way of a summary of the New York law in this regard, citing cases:

"§56. Building and construction contract.

"The general rule of damages that a party injured by breach of contract is entitled to compensation for injuries which are the direct, natural, and immediate effect of the breach, and which can reasonably be said to have been foreseen or contemplated at the time the contract was made, is applicable to the breach of building and construction contracts. Thus, upon breach by the contractor, the general measure of damages to the employer is the loss which reasonably and proximately results from the breach of the contract. The contractor thereby becomes liable for all damages which naturally ensue to the owner.

"Cost of completion or correction ordinarily affords the proper measure of damages, rather than loss of property value. Ordinarily, the loss of the employer is the difference between the contract price and the fair cost to complete the contract under the conditions made by the breach. The owner may recover any cost in excess of the contract price to which he may be put in order to have the work finished.

> "Recovery may be had for any special damages which arise from the circumstances peculiar to the particular case and which were disclosed to have been within the contemplation of the parties."

Applying the above principles to the facts of this case, it must be concluded that the damages imposed by the Trial Court were both (1) the direct, natural and immediate result of Fort Pitt's breaches of contract, and (2) well within the contemplation of the parties, or, stated another way, that the parties at least should reasonably have been aware that a delay in delivery of steel would result in imposing additional costs upon Torrington in completing its contract work.

The requirement imposed by the principles enunciated in the above-quoted judicial authorities is not the exact nature or amount of the damages must be reasonably within the contemplation of the parties at the time of contracting, but rather that damages may reasonably be expected to follow a failure on the part of one party to perform the obligations it undertook to perform by the terms of the contract.

Under the undisputed facts of this case, the parties did not, by the initial subcontract document, prescribe a specific date, or, for that matter, any date when the steel for the bridge had to be delivered and erected, although obviously both parties knew that such delivery and erection would have to be well in advance of Torrington's mandatory contract completion date for the entire highway project. On the contrary, Fort Pitt had provided in the subcontract document that the steel delivery date would be mutually fixed, *i. e.*, presumably *after* the execution of the subcontract. Therefore, at the time of the initial execution of the subcontract, neither party was aware exactly when the steel would be required to be

delivered and erected, and accordingly could not contemplate at that stage what damages, if any, might arise from failure of delivery of the steel, or, conversely, from any failure of Torrington to accept the steel when delivered. However, there came a time, very soon after initial subcontract execution, when under the terms of the subcontract the parties did agree on a date for delivery of the steel. This date was late June of 1970.

It should be noted that when Torrington had initially signed Fort Pitt's subcontract form on October 9, 1969 (A38), the executing officer, Theodore Zoli, Jr., had neglected to indicate a unit price arrangement preference, as required (A37). The subcontract form contained two different steel price options, dependent upon whether or not Torrington would agree to furnish certain equipment and operating personnel to Fort Pitt's erector, Syracuse Rigging. The subcontract was, as returned to Fort Pitt, incomplete. Also, Torrington imposed additional subcontract requirements to those proposed by Fort Pitt (A15-28). Fort Pitt accepted and agreed in writing to these additional requirements on October 13, 1969 (A16), and returned a signed copy of the additional requirements (A16) to Torrington by letter of the same date (A39-40). In this October 13, 1969 letter, Fort Pitt, as noted earlier in this brief, requested Torrington to set a time for structural steel delivery, in the following language, indicating that it would schedule shipment of the steel in accordance with Torrington's request:

> "Will you please advise your projected requirement for the structural steel and erection. Please advise at your earliest convenience as we will want to schedule shipment in accordance with your request" (A39).

In the same October 13, 1969 letter Fort Pitt resubmitted a copy of its subcontract form to Torrington, for designation of the unit price arrangement desired by Torrington (A39).

Torrington, as also noted earlier in this brief, sent a letter to Fort Pitt on November 3, 1969, indicating that its structural steel requirements would be "late June 1970" and asking Fort Pitt to:

> "Please advise us at your earliest convenience if this date will be met" (A41).

Fort Pitt acknowledged the late June 1970 structural steel requirement date set by Torrington, by appellant's letter of November 12, 1969, agreeing as follows:

> "We are tentatively scheduling this work per your requirements and would appreciate your keeping us advised as your work progresses" (A42).

In the same letter, Fort Pitt indicated that it still was necessary for Torrington to return to it a signed copy of the subcontract with designation of the unit price arrangement desired by Torrington (A43), as had been earlier requested in Fort Pitt's October 13, 1969 letter.

The exact language of the second request was as follows:

> "Also, may we have our original quote, resubmitted for your signature and choice of price on October 13, 1969, so that we may complete our files?" (A43).

Torrington subsequently delivered to Fort Pitt the requested executed document, with choice of price option designated, which document had been signed on behalf of Torrington on October 28, 1969 (A12-14, 91).

It would seem, therefore, that the subcontract did not come into existence, legally, until the delivery of this last executed subcontract document to Fort Pitt. Until that time, crucial contractual obligations and provisions were not fixed.

As of such time, as seen by the foregoing, the parties had already agreed upon the late June 1970 structural steel requirement date. At this point, Fort Pitt could reasonably be expected to anticipate that if it did not substantially comply with this late June 1970 steel requirement date, damages would undoubtedly be occasioned to Torrington, which necessarily had to coordinate its work at the contract site so as to be prepared to receive the steel and furnish a site for its erection by Fort Pitt's subcontractor, Syracuse Rigging, when it was delivered. No other expectation would be reasonable.

Fort Pitt, like other steel suppliers, is a sophisticated business organization. It does not operate in a vacuum of lack of knowledge concerning the construction industry. It is well aware that to any contractor "time is money." Contractors typically do not plan jobs so as to finish them at the last moment—on the contrary, contractors try to plan their construction so as to complete each job at the earliest possible date. The earlier the job is finished, the more money the contractor should make. Torrington's job was no exception to the rule and Fort Pitt knew this—Fort Pitt well knew, and could see by the project documents, that the bridge would be one of the last portions of Torrington's project to be completed. And, by virtue of the "early June, 1970" steel requirement date, Fort Pitt well knew that Torrington planned on completing the entire project during the 1970 working season, its belated cries of ignorance notwithstanding. No other assumption would be reasonable—and this was, as previously noted, and as the Court Be-

low found, the fact (A65). Fort Pitt knew, from the beginning to the end, that if it did not deliver the steel when the contractor had planned on it and requested it from appellant, there would be damages incurred. Fort Pitt reasonably had to know that if it was so late in its steel delivery that the planned 1970 job completion of Torrington was threatened, Torrington would be forced to expedite the job with added equipment and extra hours of labor by its forces, so as to avert the massive costs involved in going over into another construction season. It would be in its own self-interest and in the interests of Fort Pitt, to minimize damages. It was, conceivably, even a legal duty on the part of Torrington to do so.

Fort Pitt was kept informed by Torrington throughout the winter months and spring of 1970 that its June 1970 structural steel requirement had not changed (A42-50). As found by the Court Below, Fort Pitt's president testified that Torrington's steel requirement was less than 1% of Fort Pitt's annual bridge steel output for 1970 (A73). While Fort Pitt gave various generalized excuses such as "plant expansion" for an alleged inability to timely supply Torrington with its steel for the job, none were shown to be "beyond Fort Pitt's reasonable control" (as was necessary to free Fort Pitt from its subcontract liabilities) (A73, A37).

Nevertheless, as set forth in the Statement of the Case, *supra*, Fort Pitt contended that it could not meet, for reasons of its own, the late June 1970 delivery date. The date that Fort Pitt ultimately, under threat of subcontract termination and suit by Torrington, promised delivery of the steel was early August, 1970 (A49-51). Again, Fort Pitt reasonably had to be aware that if this second date of delivery was not met, Torrington would undoubtedly be exposed to additional or extra costs in

order to complete its contract work once the steel was delivered. Any experienced materialman, including Fort Pitt, would have been aware that it was in the interest of Torrington to complete its contract work as expeditiously as possible and to place the steel and complete its bridge promptly and with reasonable expedition, especially in light of an initial steel delivery date which had been set back over one month during the best part of the construction season. In spite of this, Fort Pitt did not meet the promised shipping date. As found by the Court Below, Fort Pitt apparently decided to overlook or neglect Torrington's steel needs for other more extensive projects elsewhere (A73).

Fort Pitt expressly recognized the potential effect of weather on the contract work by its letter of January 29, 1970 (A46-47), heretofore quoted. It is reasonable to presume that Fort Pitt was aware that once the bridge steel was in place Torrington had to pour the concrete deck thereon and to do associated work in order to complete the bridge. Fort Pitt was aware and is chargeable with knowledge that this bridge was part of the highway contract being performed by Torrington and entered into by Torrington and the State of New York, and that it was to be completed in accordance with the specifications applicable to said work (see paragraphs 3 and 4 of the complaint and admissions thereto by answer of Fort Pitt and the allegations of the counterclaim asserted by Fort Pitt conceding its knowledge of the existence of the contract between Torrington and the State of New York) (A58-59).

The brief of Fort Pitt comments upon and tries to make much of the fact that the contract between the State and Torrington did not absolutely have to be completed until December 15, 1971. This date was simply the

outer boundary for completion of the entire project beyond which Torrington could not go without being subjected to heavy daily liquidated damages in favor of the State (A84-85). Torrington was required by the terms of the State's contract to submit a construction schedule to ensure contract completion within the time allowed. As pointed out by the Trial Court, however, this did not preclude Fort Pitt and Torrington from entering into an agreement providing for the delivery and erection of steel at some prior date, or, for that matter, at any date which was mutually agreeable to the parties, which is exactly what the parties did (A74).

It has long since been established by the New York Courts that even the State of New York cannot defeat a contractor's breach of contract action for delays incurred, by citing the fact that the contract was completed within the time set forth therein for mandatory completion. If the State unjustifiably delays the contractor's work, for whatever period, the State is liable for whatever damages may be incurred by the contractor, even when he completes the job ahead of schedule. See, *e. g., Shore Bridge Corp. v. State of New York*, 186 Misc. 1005, 61 N. Y. S. 2d 32 (Ct. Cl. 1946), aff'd 271 App. Div. 811, 66 N. Y. S. 2d 921 (4th Dept. 1946), generally considered the leading case on this point.

Here, Fort Pitt argues, in effect, that it has rights under the Torrington-State contract, apparently as some sort of third-party beneficiary, in excess of those of the State itself. This simply cannot be.

It has always been the law of New York that a contractor is entitled to perform the work under his contract in the customary, economical manner, and to employ all the agencies and forces and methods consistent with

the contract specifications which in his judgment can wisely and advantageously be used; he must be unrestricted in the employment of means to accomplish the contract work. See the *Shore Bridge* case, *supra,* and *R. H. Baker Co., Inc., v. State,* 267 App. Div. 712, 717, 48 N. Y. S. 2d 272 (3rd Dept. 1944), aff'd 294 N. Y. 698, 60 N. E. 2d 847 (1945); *American Bridge Co., Inc., v. State,* 245 App. Div. 535, 258 N. Y. Supp. 39 (3rd Dept. 1935); *Camili & Sons, Inc., v. State,* 41 Misc. 2d 218, 225, 245 N. Y. S. 2d 521 (Ct. Cl. 1963). Torrington had a perfect right, as found by the Court Below, to complete its project ahead of schedule and to thereby achieve early performance and acceptance at reduced expense.

Fort Pitt was concededly not privy to the contract between the State of New York and Torrington, and even if it were, it is immaterial to the facts herein, because Fort Pitt agreed to a shipment date for the steel no later than early August, 1970, a date which it concededly did not meet and which inevitably and in the natural course of events led to the damages imposed on Torrington. To now argue or even suggest that under all the circumstances these damages were not within the contemplation of the parties is almost specious.

The New York Court of Appeals laid down guidelines for ascertaining contractual obligations in the following manner in *Shirai v. Blum,* 239 N. Y. 172, 176 N. E. 194 (1924):

> "Contractual obligations are fixed solely by the parties, and the language of a business contract must be construed in the light of what a businessman would reasonably expect to give or receive, to perform or suffer, under its terms" (239 N. Y. 179).

Further in the same case, the Court of Appeals stated that:

> "* * * contracts made between businessmen in the usual course of business should not receive a technical construction which would require a businessman to keep at his elbow a counselor learned in the law to advise in every contingency, what his legal rights and obligations may be" (239 N. Y. 181).

Here, it seems manifestly clear that both parties understood that, under Fort Pitt's subcontract form, if Torrington agreed to purchase its project steel requirements from Fort Pitt, the parties would agree upon a delivery date therefor, which would then be adhered to—under penalty of legal liability for failure to timely deliver. The parties did mutually agree on a date. It was not met, through no fault of Torrington. Nor was a later delivery date substituted by Fort Pitt met. Fort Pitt should be held liable to Torrington for its damages.

In this respect the following language from *For The Children, Inc., v. Graphics International, Inc.*, 352 F. Supp. 1280 (D.C. S.D.N.Y., 1972), is rather appropriate:

> "The contemplation of the parties was that the entire order would be sold to the public. * * * ascertainment of the damages are difficult of precise determination. However, this uncertainty does not mean that plaintiff is to be deprived of a recovery; to do so would permit a person who has breached his agreement to escape liability. The law will not tolerate such a result; instead it seeks to award to the injured party reasonable damages naturally flowing from the breach. To achieve that result, different circumstances call for different measures to be applied."

Here, the most logical (and smallest) measure of damages was the added cost to Torrington of completing its project, due to Fort Pitt's breach, within the 1970 working season. If Torrington had let the job go over into the 1971 season, and then completed the work, the damages would necessarily have been much greater.

On the record now before this Court, there is, moreover, no evidence that Fort Pitt at any time challenged or questioned the reasonableness or justness of the damages alleged and proved by Torrington and found by the Trial Court. Since the rule in this State is that when evidence offered by or on behalf of a party is uncontradicted, is not improbable in nature, and is not surprising or suspicious, there is no reason for denying it conclusiveness. *Gnichtel v. State*, 233 N. Y. 465, 469, 135 N. E. 852 (1922); *Hull v. Littauer*, 162 N. Y. 569, 572, 57 N. E. 102 (1900); *Charles Smith and Sons Constr. Co., Inc., v. State*, 266 App. Div. 886, 42 N. Y. S. 2d 814 (3rd Dept. 1943), aff'd 292 N. Y. 691, 56 N. E. 2d 109 (1944); *Turner v. State*, 253 App. Div. 784, 1 N. Y. S. 2d 157 (3rd Dept. 1937), mod. on other grounds 279 N. Y. 243, 18 N. E. 2d 143 (1938); *The Immick Co. v. State*, 251 App. Div. 919, 297 N. Y. Supp. 623 (3rd Dept. 1937); *Arc Engineering Corp. v. State*, 40 N. Y. S. 2d 354, 357 (Ct. Cl. 1942), aff'd 267 App. Div. 797, 46 N. Y. S. 2d 887 (3rd Dept. 1943), aff'd 293 N. Y. 819.

The gist of Fort Pitt's brief is to the effect that somehow, if this Court does not reverse the Court Below and deny to Torrington the breach of contract damages awarded to it after trial, Fort Pitt and other steel suppliers "will be at the absolute mercy of their customers." This is absolute bunk. Fort Pitt and other steel companies (of which there are relatively few across the United States) can adequately protect their interests through appropriate contractual language. Contractors

always have to have steel for bridges and other structures. There are more than enough customers for the small number of heavy steel suppliers. The economic facts of life are that contractors cannot dictate the terms of purchase contracts to the suppliers—the exact opposite is true. Here, however, for whatever reason, Fort Pitt did not contractually insulate itself from liability for damages for failure to deliver the subject structural steel at the time mutually agreed by the parties. It promised steel delivery, first in June and then in early August, 1970. It failed to deliver, for reasons of its own (possibly as the result of a management decision to supply larger more lucrative jobs) to Torrington's injury, which Fort Pitt clearly should have anticipated. It must, therefore, respond in damages to Torrington.

2.

Where interest is not payable by the terms of a contract but is simply allowable as damages for default in payment, then the interest is not regarded as part of the debt, but as a mere incident to it, and receipt of the principal bars a subsequent claim for interest. The Court Below awarded and Torrington has paid all interest to which appellant is entitled on its counterclaim.

The argument advanced by Fort Pitt on pages 11-15 of its brief relates to an alleged late payment of moneys held to be due from Torrington to Fort Pitt for delivery and erection of the structural steel heretofore referred to. The Trial Court, by Finding 22, has found that the unpaid balance of the contract price as of September 7, 1972, was $23,240.12 (A73). As against this amount, by reason of the Trial Court's decision, Torrington was found to be entitled to a credit of $7,653.57 for damages sustained from Fort Pitt's delayed performance

and its failure to have Syracuse Rigging on the contract site when the first shipment of steel was received. The Trial Court awarded Fort Pitt judgment for the net balance of $15,636.55 "with interest at the legal rate in the State of New York from November 12, 1970" (A73-75).

Judgment was initially entered in accordance with this direction, in the base amount of $15,636.55, together with interest at 6 per cent from November 12, 1970, amounting in all to $18,371.68 and said judgment was duly paid by Torrington. Thereafter, Fort Pitt made a motion to amend the Trial Court's findings on the ground that it was entitled to interest on prior payments made in the sum of $51,000 between December 11, 1970 and September 1, 1972. The Court denied this motion on the grounds that the payments in question were accepted by Fort Pitt (the court referred to Fort Pitt as "Spang") without protest and, accordingly, under the authority of New York Court of Appeals case of *Crane v. Craig*, 230 N. Y. 452, 130 N. E. 609 (1921), and other authority, said request was denied (A80). The Court did, with consent of Torrington, amend the judgment by computing interest at the rate of 7½ per cent on the $15,636.55 found to be due Fort Pitt from November 12, 1970, thereby increasing the total amount of the judgment from $18,371.68 to $19,252.50* (A78-81). This judgment was entered and promptly paid by Torrington.

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*It must be noted that an error was made in such interest calculation, since New York C.P.L.R. Section 5004, which formerly provided for interest "at the legal rate" (i. e., as set by the New York State Banking Board) was amended effective September 1, 1972, to provide for interest at the rate of 6 per cent. Thus, interest should correctly have been calculated at the rate of 7½ per cent from November 12, 1970, through August 31, 1972, and at the rate of 6 per cent from September 1, 1972, until December 12, 1973. Instead of $3,615.95 interest, there should correctly have been $3,321.46 interest—a difference of $294.49 for a total judgment of $18,958.01.

The subcontract which is the subject of this action, while it did require payment of net amounts billed within 30 days of invoice, did not provide for interest in the event a payment was made late (Ex. G, A88-91). There is no New York State statute which provides for interest under the facts of this case. The decisional law of New York dictates that interest be denied under said facts.

In *Crane v. Craig, supra*, so far as applicable to the facts of this case, it is provided as follows:

> The rule, however, appears to be that where the interest is not payable by the terms of the contract, but is simply allowable as damages for the default in payment, then the interest is not regarded as a part of the debt, but as a mere incident to it, and the receipt of the principal bars a subsequent claim for the interest for the reason that in such cases interest being a mere incident, cannot exist without the debt, and the debt being extinguished the interest must necessarily be extinguished also (*Stewart v. Barnes*, 153 U. S. 456).

This rule enunciated by the New York Court of Appeals was already one of long standing at the time of the above-cited case. See, e. g., *Jacot v. Emmett*, 11 Paige 142 (1844); *Southern Central R.R. Co. v. Town of Moravia*, 61 Barb. 180 (1871); *Hamilton v. Van Rensselaer*, 43 N. Y. 244 (1871); *Cutter v. City of New York*, 92 N. Y. 166 (1883); *Matter of Hodgman*, 140 N. Y. 421, 35 N. E. 660 (1893).

The rule has been repeatedly applied by the New York Courts to various factual situations since the time of the *Craig* case. See, e. g., *Matter of City of New York (Westchester Avenue)*, 217 App. Div. 381, 216 N. Y. S. 730 (1st Dept. 1926); *Union Trust Company of Rochester v. Kaplan*, 249 App. Div. 280, 292 N. Y. S. 152 (4th Dept. 1936). It has time and again been approved by

the Court of Appeals. See, e. g., *Keybro Ent. v. Four Seasons Caterers,* 25 A. D. 2d 307, 269 N. Y. S. 2d 291 (1st Dept. 1966), affirmed 19 N. Y. 2d 912, 227 N. E. 2d 895 (1967), in which case it was stated:

> "Of course, where a statute specifically allows interest, the interest may be considered a part of the claim (*Matter of Crane v. Craig,* 230 N. Y. 452). Or, where interest is provided for in the contract, 'the payment of the principal debt will not defeat the right to recover accrued interest by a subsequent suit' (47 C.J.S., Interest, §71, Subd. b). A check of the cases cited in the footnote indicates the application of the principle in New York chiefly in connection with the moratory statutes or matter involving realty. (Civ. Prac. Act, art. 65 §§ 1077-1080; see, *White v. Wielandt,* 259 App. Div. 676, affd. 286 N. Y. 609; *Central Hanover Bank & Trust Co. v. Roslyn Estates,* 266 App. Div. 244.) 'The rule, however, appears to be that where the interest is not payable by the terms of the contract, but is simply allowable as damages for the default in payment, then the interest is not regarded as part of the debt, but as a mere incident to it, and the receipt of the principal bars a subsequent claim for the interest for the reason that in such cases interest being a mere incident, cannot exist without the debt, and the debt being extinguished the interest must necessarily be extinguished also [citation]. But where interest is specifically reserved *by the instrument* and forms an integral part of the debt, the rule is different for then the acceptance of the principal without the interest does not extinguish the debt, and the mere acceptance of part, either of principal or interest does not bar a subsequent claim for the whole, whether with or without protest, for the payment of part is generally a satisfaction of the whole unless there is an agreement of some kind that the payment made shall be a satisfaction of the whole'" (*Matter of Crane v. Craig,* 230 N. Y. 452, 461) (25 A. D. 2d 310-311).

Here the subcontract between Fort Pitt and Torrington made no provision for interest, as aforestated.

On the evidence before this Court, it appears that the fact was that Torrington made certain payments to Fort Pitt of all the sums it conceded to be due, between December 11, 1970 and September 1, 1972, as found by the Trial Court, and such payments were accepted without protest or reservation by Fort Pitt.

At the outset of this litigation it was the contention of Torrington that it had been damaged to the extent of $23,290.81 by reason of the delays in delivering and erecting the structural steel (Complaint, A32-36). Torrington withheld said sum from Fort Pitt, a fact conceded by paragraph designated "4" of the counterclaim of Fort Pitt (see Paragraph 4 of counterclaim; A59).

Attention of the Court is also invited to the fact that by said counterclaim Fort Pitt alleges that the total amount due from Torrington to Fort Pitt was $132,274.73, against which Torrington is credited by the allegations of the counterclaim with having paid $108,983.92, leaving the disputed balance of $23,293.81, for which the counterclaim was asserted, together with interest (see Paragraph 4 of counterclaim; A59-60). From this pleading it must be presumed that Fort Pitt had credited the account with payments on principal made by Torrington in the sum of $108,983.92 and accepted those payments of principal without any reservation of any claim for interest, which, of course, is the fact. Fort Pitt never made a claim for such interest upon the trial of this case.

This fact is further substantiated by Fort Pitt's "Requests for Findings of Fact and Conclusions of Law" submitted to the Court Below.

At proposed Finding of Fact No. 36, Fort Pitt requested as follows:

> "36. For the Item 29 steel on project FARC 69-104 and against the said Fort Pitt invoices, Torrington made the following payments to Fort Pitt (Defendant Exhibit 'K'):
>
> | Date | Amount |
> |---|---|
> | 12/11/70 | $ 60,000.00 |
> | 2/04/72 | 20,000.00 |
> | 9/07/72 | 28,983.92 |
> | Total | $108,983.92 |
>
> The *principal* balance is $23,290.81." (Italics added.)

Likewise, at proposed Finding of Fact No. 38, Fort Pitt asked the Court Below to find:

> "38. In the prosecution of the work provided for in the said prime contract, Fort Pitt furnished, fabricated and erected the structural steel, Item 29, under a subcontract with Torrington for the total sum of $132,274.73, none of which was paid promptly and of which $23,290.81 remains due and payable."

Under these circumstances, there can be little doubt that Fort Pitt waived any right it may have had, if any, to the interest now belatedly claimed.

The Trial Court followed Fort Pitt's own approach and its specific requests in finding that the unpaid balance was $23,243.12, as of September 7, 1972, crediting Torrington with $7,653.57, and directing judgment in favor of Fort Pitt for the sum of $15,636.55, with in-

terest at the legal rate in New York from November 12, 1970. It ill behooves Fort Pitt now, on appeal, to complain thereof.

Torrington, as heretofore pointed out, has made the payments directed by the Court Below, both by its original judgment and its amended judgment heretofore described. Under the law of the State of New York and the facts of this case, Fort Pitt has been fully compensated, in accordance with the decision of the Trial Court.

Under the facts of this case, none of the cases cited by appellant in Point 2 of its brief are applicable, except *Crane v. Craig, supra.*

Conclusion.

The judgment of the District Court appealed from herein should be affirmed in all respects.

Respectfully submitted,

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C. Jane Hoffman
Notary Public

C. JANE HOFFMAN
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